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IN THE

Supreme Court of the United States

October Term, 1964

No. 934

ROBERT CORPORA,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals
of the State of New York

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Statement as to Jurisdiction

This is an appeal from a decision of the Court of Appeals of the State of New York, entered January 7, 1965, unanimously affirming the judgment of the Criminal Court of the City of New York, New York County, rendered October 24, 1963, which convicted the appellant, after trial, of violating Section 2147 of the New York Penal Law. The jurisdiction of this Court is conferred by 28 U. S. C. §1257(2).

Questions Presented

(1) Whether Section 2147 of the Penal Law, on its face or as applied here, denies the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether Section 2147, on its face or as applied to this appellant, is an interference with the right of publication and distribution guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The Statute Involved

Section 2147 of the Penal Law reads, in pertinent part:

> "All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:
>
> • • •
>
> 4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, magazines, gasoline, oil, tires, cemetery monuments, drugs, medicine and surgical instruments may be sold and may be delivered at any time of the day." As amended by L. 1960, c. 729.

McKinney's Consolidated Laws of New York Annotated, Volume 39, Penal Law.

Statement of Facts

The facts in this case are not disputed. On Sunday, August 18, 1963, at about 2:45 p.m., the appellant sold a bound book to an unknown person at a book store located at 651 Lexington Avenue, City and County of New York (Record on Appeal, pp. 8-9). There is testimony on the record that books are sold on Sunday at the Metropolitan Museum of Art, American Museum of Natural History, Bronx Zoo and other museums and historical societies throughout New York City, as well as being sold at some of the newsstands located in railroad and subway stations and at some of the stationery stores which also sell newspapers (*id.* at 12-13). The appellant was convicted, after trial, of violating Penal Law §2147, and given a suspended sentence.

ARGUMENT

POINT I

Section 2147 of the New York Penal Law, either on its face or as applied, does not violate the equal protection clause of the United States Constitution.

It is well established that a state statute may not be struck down as offensive to equal protection in its schemes of classification unless it is obviously arbitrary, or so patently without reason when considered in the light of the statute's objectives that no conceivable state of facts could be found to justify them [*e.g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 426, 535 (1960); *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584 (1935); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-9 (1911)].

Plainly there is a rational basis for distinguishing between the sale of books and the sale of newspapers and magazines for the purpose of Section 2147. The legislature has set aside a day of rest and relaxation for the physical and moral welfare of the members of the community by enacting a statutory scheme which prohibits specified activities on Sunday with some exceptions as to necessities, recreation and conveniences [*People* v. *Friedman*, 302 N. Y. 75, 80 (1950), *appeal dismissed* 341 U. S. 907 (1951)]. The bustling, competitive activity of selling is forbidden, except in those instances involving commodities deemed essential to the public's welfare or its quest for needed relaxation. As opposed to books, newspapers and to a lesser extent magazines perform the necessary function of conveying immediate, ever-changing ideas and comments upon daily and weekly events which, to be effective and fully appreciated, must be distributed with dispatch before the articles become outdated. Moreover, magazines and newspapers have to be considered together for the purpose of the statute because of the impracticability of enforcing a distinction between similar items commonly sold at the same place of business. Since magazines and newspapers are almost always sold at the same commercial locations, the exception made for magazines does not add many, if any, new selling establishments to those already permitted to operate on Sunday. This would not be true in the case of books, where hundreds of additional stores in New York City alone would be opened to patronage by the lifting of the prohibition.

The fact that some books are sold in museums, zoos, drug stores, stationery stores selling newspapers and in transport stations does not evidence conscious discrimina-

tory enforcement, but merely indicates (1) that some of the books sold, such as art books sold by museums, come under the exempt classification of "souvenirs" [Penal Law §2147 (4)], and (2) that there is some excusable non-enforcement as to the sale of books in businesses legally open on Sunday for purposes of transportation or for the sale of permitted commodities such as drugs [see *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1943); *People* v. *Friedman*, *supra*, at 80-1].

Thus, a rational and non-discriminatory scheme, dictated by the purposes of the Sabbath Law, is as much geared to the nature of the place of business allowed to operate as it is to the nature of the item sold. An art gallery, railroad terminal, or drug store, whose principal function is consistent with the Sabbath atmosphere, may operate on Sunday and no useful purpose would be served by curtailing the sale of books which is normally incidental to the functioning of such enterprises. But such incidental sales do not justify the additional commercial operation of stores whose principal function is the sale of books.

It is wholly beside the point of the present case to speculate upon any hypothetical violation by a book-seller operating by concession in a place legally open on Sunday. The point is that the application of the penal sanction of Section 2147 to this appellant, who operated his bookstore independently of any exempt activity, was not constitutionally arbitrary and discriminatory application of the law.

Nor is there any legitimate purpose here in debating the value of opening bookstores for business on Sunday.

It may well be that the sale of books is consistent with the serious cultural pursuits or at least restful entertainment allowed for Sabbath pastimes. If so, it is for the legislature to say. In arriving at the list of permitted commerce, that body, as the community's representatives, reached a judgment which should not be judicially gainsaid [see *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 525 (1937)].

POINT II

The statute does not unreasonably interfere with the constitutionally protected right of publication and distribution.

The freedom of speech and of the press is not absolute, and the state may enact reasonable restrictions in the interest of public safety, health, welfare or convenience [*e.g.*, *Schneider* v. *State*, 308 U. S. 147 (1939)]. The time and the place of publication and distribution [*Breard* v. *Alexandria*, 341 U. S. 622, 641-5 (1951); *Cox* v. *New Hampshire*, 312 U. S. 569, 575-8 (1941); see *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, 684 (1963)] as well as the manner of communication [*Kovacs* v. *Cooper*, 336 U. S. 77 (1949)] may be regulated by the legislature. Books by their very nature and choice of subject matter do not require daily distribution in order to accomplish their purpose or to be financially successful. Section 2147 merely forbids the sale of books, along with the sale of numerous other commodities, one day a week, on the Sabbath, not for the purpose of censorship or hindering effectiveness, but solely for the purpose of limiting commercial activity. When considered in the light of its objective and its appli-

cation to other merchandise, Section 2147 cannot be classified as an unreasonable restraint on free expression [*cf. Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184 (1946)].

Conclusion

The appeal should be dismissed, or, in the alternative, the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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